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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO ALVAREZ-PAZ, Defendant and Appellant.	F037204 (Super. Ct. No. SC080773A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Roger D. Randall, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Louis M. Vasquez and Kathleen A. McGurty, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Ardaiz, P.J., Vartabedian, J. and Harris, J.

The issue presented to us in this case is whether the crime of "assault upon the person of another … by any means of force likely to produce great bodily injury" (Pen. Code, §245, subd. (a)(1),[1] sometimes called "aggravated assault") is necessarily an "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245" (§ 1192.7, subd.(c)(31)). If the answer is yes, as respondent contends, then the crime is a "serious felony" (§ 1192.7, subd. (c)) and therefore also a "prior felony conviction" (§ 667, subd.(d)(1); § 1170.12, subd.(b)(1); commonly called a "strike") within the meaning of California's three strikes law (§ 667, subds.(b)-(i); § 1170.12). If the answer is no, as appellant contends, then the crime is not a "serious felony" unless the particular circumstances of the crime bring it within one or more of the categories of serious felonies listed in section 1192.7, subdivision (c). As we shall explain, we agree with appellant that the answer is no.

FACTS

Appellant Rodolfo Alvarez-Paz shot and killed his neighbor and coworker, Rick Lee Gardiner. A jury found appellant guilty of second degree murder (§ 187; count 1) and of being a felon in possession of a firearm (§ 12021.1, subd. (a); count 2.) The jury also found that appellant personally discharged a firearm in the commission of the murder (§ 12022.53, subd. (d)). The factual circumstances of those crimes, and the abundant sufficiency of the evidence to support the jury's findings, are not in issue on this appeal. The facts pertinent to this appeal are procedural ones, to which we now turn.

The amended information included special allegations that appellant had suffered prior convictions and had served prior prison terms. It alleged that appellant had two "strikes" -- a 1988 conviction for a violation of section 192, subdivision (a) (voluntary

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[1] All further references are to the Penal Code unless otherwise stated.

manslaughter), and a 1996 conviction for a violation of section 245, subdivision (a)(1) ("assault … with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury ...."). It also alleged that appellant had two section 667, subdivision (a) prior serious felony convictions (the 1988 manslaughter conviction and the 1996 § 245, subd. (a)(1) conviction). Finally, it alleged that appellant had served three prior separate prison terms (§ 667.5, subd. (b)). These were for a 1988 conviction for battery on a peace officer (§ 243, subd. (c)), for the 1988 manslaughter (§ 192, subd. (a)), and for the 1996 § 245, subd. (a)(1) conviction. At appellant's request, these special allegations were tried without a jury. At the non-jury portion of the trial, the prosecutor introduced into evidence a section 969, subdivision (b) packet and then rested. The packet contained abstracts of judgment for the three prior convictions alleged in the amended information. The defense presented no evidence. The court found the special allegations to be true.

The court sentenced appellant as a "third striker." Appellant received a term of 45 years to life for the murder (i.e., 15 years to life, tripled pursuant to § 667, subd. (d)(2)(A)(i)), plus 25 years to life for the intentional and personal discharge of a firearm causing death (§ 12022.53, subd. (d)), plus a determinate term of 11 years of enhancements to be served first. The 11 years consisted of two 5-year section 667, subdivision (a) prior felony conviction enhancements (for the 1988 manslaughter conviction and the 1996 § 245, subd. (a)(1) conviction), and one 1-year section 667.5, subdivision (b) prior prison term enhancement (for the 1988 battery on a peace officer). Punishment on the remaining two section 667.5, subdivision (b) enhancements was stricken. Appellant's sentence on the count two felon in possession conviction (25 years to life) was stayed pursuant to section 654.

APPELLANT'S CONTENTIONS

Appellant raises two contentions on this appeal. First, he argues that his section 245, subdivision (a)(1) conviction was not proven to be a "strike" (i.e., a § 667, subd. (d)

"prior conviction of a felony"). Second, he contends that the court's "true" finding on the section 667.5, subdivision (b) prior separate prison term allegation for the 1988 section 243, subdivision (c) battery conviction must be set aside because the evidence showed that appellant's sentence for this crime was ordered to be served concurrently with (and not separate from) the sentence for his 1988 manslaughter conviction. On this second point, the section 969, subdivision (b) packet shows that appellant is correct, and respondent concedes the issue.

NOT ALL SECTION 245, SUBDIVISION (a)(1) CONVICTIONS ARE "STRIKES"

California's three strikes law was enacted "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) Under the three strikes law, a "prior conviction of a felony" (commonly called a "strike") is defined to include "[a]ny offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." (§ 667, subd. (d)(1); § 1170.12, subd. (b)(1).) Subdivision (c)(31) of section 1192.7 defines "serious felony" to include "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245." The abstract of judgment of appellant's 1996 section 245, subdivision (a)(1) conviction was entered into evidence (as part of respondent's Exhibit 9, the § 969, subd. (b) packet) to prove the existence of that 1996 conviction and to prove that the 1996 conviction was a "strike." This evidence did demonstrate that appellant suffered the 1996 section 245, subdivision (a)(1) conviction, but it failed to demonstrate that this particular section 245, subdivision (a)(1) conviction fell within the language of subdivision (c)(31) of section 1192.7.

The abstract of judgment listed the "section number" of appellant's 1996 conviction as "245(a)(1)." It described the "crime" as "Asslt GBI w/deadly weap." It

listed the "time imposed" for the conviction as the upper term of 4 years. Section 245, subdivision (a)(1) states: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." As the plain language of section 245, subdivision (a)(1) makes clear, and as the court in *People v. Rodriguez* (1998) 17 Cal.4th 253 pointed out, one may violate section 245, subdivision (a)(1) "without … using a deadly weapon." (*Id*. at p. 261.) In other words, section 245, subdivision (a)(1) is violated by "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm" but is also violated by "[a]ny person who commits an assault upon the person of another ... by any means of force likely to produce great bodily injury." (§ 245, subd. (a)(1).) When the statute is violated in this second manner, "one may commit the assault with force 'likely' to cause great bodily injury without, however, *actually* causing great bodily injury or using a deadly weapon." (*People v. Rodriguez, supra,* 17 Cal.4th at p. 261.)

The abstract's abbreviated description of appellant's 1996 offense sheds no light on whether appellant's crime was an assault "with a deadly weapon or instrument" or an assault without a deadly weapon or instrument but by a "means of force likely to produce great bodily injury." This is significant because "assault with a deadly weapon" is expressly listed in section 1192.7, subdivision (c)(31) as a serious felony but "assault by any means of force likely to produce great bodily injury" is not. To state this a bit differently, one can violate section 245, subdivision (a)(1) by committing an assault, without a weapon but by "means likely to produce great bodily injury," on a victim who is neither a peace officer nor a firefighter. Such a section 245, subdivision (a)(1) violation would not be an "assault with a deadly weapon, firearm, machinegun, assault

weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245." (§ 1196.7, subd. (c)(31).) It would instead be an assault without a deadly weapon, without a firearm, without a machinegun, without an assault weapon, without a semiautomatic firearm, and not upon a peace officer or firefighter.

Subdivision (c)(31) of section 1192.7 was approved by the voters of California on March 7, 2000, as part of an initiative statute known as the Gang Violence and Juvenile Crime Prevention Act of 1998 (also sometimes called "Proposition 21"). In our view, the law applicable here is the longstanding, well established rule that a statute adopted by the voters means what it says. "'It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. [Citation.] It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed. Such is the rule when it does not appear that the words were used in a technical sense. [Citation.].'" (*Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538; in accord, see *Keller v. Chowchilla Water Dist*. (2000) 80 Cal.App.4th 1006, 1010-1011.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Keller v. Chowchilla Water D*ist., *supra*, 80 Cal.App.4th at p. 1010.) Any voter who read subdivision (c)(31) of section 1192.7 could not understand the language appearing there to include an assault without a deadly weapon, without a firearm, without a machinegun, without an assault weapon, without a semiautomatic firearm, and not on a peace officer or firefighter.

Respondent essentially ignores the plain language of subdivision (c)(31) and asks us to read another statute, section 7.5, as requiring us to "construe" the language of

subdivision (c)(31) as "descriptive language" describing any violation of section 245. Section 7.5 was enacted in 1998. It states:

> "Whenever any offense is described in this code, the Uniform Controlled Substance Act (Division 10 (commencing with Section 11000) of the Health and Safety Code), or the Welfare and Institutions Code, as criminal conduct and as a violation of a specified code section or a particular provision of a code section, in the case of any ambiguity or conflict in interpretation, the code section or particular provision of the code section shall take precedence over the descriptive language. The descriptive language shall be deemed as being offered only for ease of reference unless it is otherwise clearly apparent from the context that the descriptive language is intended to narrow the application of the referenced code section or particular provision of the code section."

Section 7.5 is not applicable here because there is no "ambiguity or conflict in interpretation" involving subdivision (c)(31) of section 1192.7. The language of subdivision (c)(31) is clear. If there were an "ambiguity or conflict in interpretation" involving any of the language in subdivision (c)(31), then section 7.5 would come into play.[2] We can easily envision the type of situation in which a true "ambiguity or conflict in interpretation" might exist and in which section 7.5 would therefore apply. Consider the following hypothetical example. First, assume that the language of subdivision (c)(31) approved by the voters had instead said "Any violation of Section 245 (assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter)." Second, assume that a defendant had a prior conviction for a violation of section 245, subdivision (a)(1) that did not involve use of a

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[2] Respondent asks us to take judicial notice of various documents comprising a portion of the legislative history of section 7.5. Nothing in these documents sheds or could shed any light on what the voters of California understood the language of section 1192.7, subdivision (c)(31) to mean when the voters approved that language on March 7, 2000. (*Kaiser v. Hopkins, supra*, 6 Cal.2d 537.) We therefore deny respondent's request for judicial notice.

weapon or instrument or the actual infliction of great bodily injury, i.e., a 245, subdivision (a)(1) conviction for "assault … by any means of force likely to produce great bodily injury." Third, assume that this hypothetical defendant was then convicted of another felony and was being sentenced as a second or third striker. Fourth, assume that the hypothetical defendant's lawyer argued that the prior section 245, subdivision (a)(1) conviction was not a strike because "assault … by means of force likely to produce great bodily injury" was not within the descriptive language appearing between the parentheses in our hypothetical subdivision (c)(31). The argument would fail. This is because the "descriptive language" (§ 7.5) would conflict with the "offense is described in this code … as a violation of a specified code section" (§7.5), namely "Any violation of Section 245" (the first clause of our hypothetical subdivision (c)(31)).

Nor do we see anything else in Proposition 21 which would suggest any intent of the voters, or even of the drafters, to include "assault … by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(1)) within the meaning of the language of subdivision (c)(31). The approval of Proposition 21 enacted several amendments to the list of serious felonies appearing in subdivision (c) of section 1192.7. Without question, many of the Proposition 21 amendments to subdivision (c) of section 1192.7 added descriptions of crimes that previously had been listed only by statute number. For example, the serious felony listed in subdivision (c)(29) of the pre-Proposition 21 version of section 1192.7, subdivision (c) was "Any violation of Section 288.5." After the approval of Proposition 21, the amended statute listed the crime of "continuous sexual abuse of a child, in violation of Section 288.5." (§ 1192.7, subd. (c)(35).) Even under the pre-Proposition 21 version of section 1192.7, an assault by any means of force likely to produce great bodily injury, but without a weapon, was not a section 1192.7, subdivision (c) "serious felony" unless particular circumstances of the crime caused it to fall within one of the types of assaults specifically listed in subdivision (c) (see, e.g., the former and present subdivisions (c)(10) and (c)(12)), or unless it was a "felony in which the

defendant personally inflicts great bodily injury on any person, other than an accomplice" (see the former and present subdivision (c)(8)). The pre-Proposition 21 version of subdivision (c)(31) stated only "Assault with a deadly weapon or instrument on a firefighter." Respondent asks us to conclude that even though the new version of subdivision (c)(31) contains language describing virtually every possible manner of violating section 245 *except* "assault … by any means of force likely to produce great bodily injury," the Proposition 21 amendments to subdivision (c) were intended to make "assault … by any means of force likely to produce great bodily injury" a strike anyway.[3]

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[3] Section 245 states:

"(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

"(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

"(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

"(b) Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years.

"(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years.

The language utilized in subdivision (c)(31) simply does not permit us to reach that conclusion.[4]

We also note that the drafters of Proposition 21 knew how to list "any violation of" a given Penal Code statute as a serious felony if they intended any violation of a

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"(d)(1) Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer of firefighter, engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years.

"(2) Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

"(3) Any person who commits an assault with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, upon the person of a peace officer of firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for 6, 9, or 12 years.

"(e) When a person is convicted of a violation of this section in a case involving use of a deadly weapon or instrument or firearm, and the weapon or instrument or firearm is owned by that person, the court shall order that the weapon or instrument or firearm be deemed a nuisance, and it shall be confiscated and disposed of in the manner provided by Section 12028.

"(f) As used in this section, 'peace officer' refers to any person designated as a peace officer in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2."

4 We note that the Second District, Division 2, recently addressed the same issue in *Williams v. Superior Court* (2001) 92 Cal.App.4th 612. The *Williams* court viewed the matter the same way we do. It ruled that aggravated assault does not fall within the meaning of the language used in section 1192.7, subdivision (c)(31). "It is unreasonable to infer that an initiative voter would understand 'assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245' to mean … 'any violation of Section 245,'…." (*Williams* v. *Superior court*, 92 Cal.App.4th at p. 624.)

particular statute to be a serious felony. That is precisely what they did in subdivision (c)(40) of section 1192.7, which lists "any violation of Section 12022.53" as a serious felony. Even if the drafters wanted to make any violation of section 245 a serious felony and also use descriptive language, this too could easily have been done. One way to do this would have been to say "any violation of Section 245, including assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter." Another way would have been to use the language we used in our above discussion of section 7.5 ("any violation of Section 245 (assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter)").

The prosecution in this case failed to prove that appellant's 1988 conviction for a violation of section 245, subdivision (a)(1) was a "strike." If that conviction was for assault with a deadly weapon, it was a strike. But if it was for assault by means likely to produce great bodily injury, then it was not a strike absent some further proof that it fell within one of the 40 categories listed in the section 1192.7, subdivision (c) definition of "serious felony." (See, e.g., § 1192.7, subd. (c)(8).)

DISPOSITION

The finding that appellant served a section 667.5, subdivision (b) prior separate prison term for his 1988 section 243, subdivision (c) battery conviction in Los Angeles County Superior Court case No. A972171 is ordered stricken. The judgment is reversed to the extent that it is based upon a finding that appellant suffered a prior felony conviction (within the meaning of California's three strikes law) in 1996 in Tulare County Superior Court case No. 38028. The district attorney shall have 30 days after the remittitur is filed in which to give notice of his intent to seek retrial of the prior felony conviction allegation. (See *People v. Monge* (1997) 16 Cal.4th 826, and *Monge v. California* (1998) 524 U.S. 721.) If the district attorney gives such notice, the court shall conduct further proceedings in accordance with this opinion. If the district attorney fails

to give such notice, the court shall resentence appellant to the term appropriate for him as a person with "one prior felony conviction that has been pled and proved" (§ 667, subd. (e)(1); § 1170.12, subd. (c)(1).) (*People v. Henley* (1999) 72 Cal.App.4th 555, 566-567.)